

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN SHIRLEY, individually and as ) Case No. 10-3870 SC  
trustee of the John F. Shirley and )  
Julie E. Shirley 2003 Trust, and ) ORDER RE: WACHOVIA'S  
JULIE SHIRLEY, ) MOTION TO DISMISS

Plaintiffs,

v.

WACHOVIA MORTGAGE FSB and WELLS  
FARGO BANK N.A.,

Defendants.

**I. INTRODUCTION**

Before the Court is a Motion to Dismiss filed by Defendant Wachovia Mortgage FSB ("Wachovia"). ECF No. 19. Plaintiffs John F. Shirley ("John") and Julie E. Shirley ("Julie") (collectively, "Plaintiffs") filed an Opposition, and Wachovia filed a Reply. ECF Nos. 22, 24. For the following reasons, the Court GRANTS IN PART and DENIES IN PART Wachovia's Motion.

**II. BACKGROUND**

Plaintiffs filed this action in California state court on July 26, 2010, seeking rescission of a mortgage loan transaction due to alleged violations of the Truth in Lending Act ("TILA") by Wachovia, as well as declaratory and injunctive relief. See ECF

1 No. 1 ("Notice of Removal") Ex. A ("Initial Compl."). Wachovia  
2 removed, and on October 27, 2010, Plaintiffs filed a First Amended  
3 Complaint, which the Court accepted as the operative complaint.  
4 ECF Nos. 12 ("FAC"), 18.

5 Plaintiffs allege that on February 29, 2008, Wachovia made a  
6 loan of \$1.76 million to the John F. Shirley and Julie E. Shirley  
7 2003 Trust ("the Trust"), secured by a deed of trust on Plaintiffs'  
8 home. FAC ¶ 8. Plaintiffs allege that they sought to rescind this  
9 loan on May 3, 2010, claiming Wachovia failed to make disclosures  
10 required under TILA. Id. Plaintiffs contend that Wachovia refused  
11 to honor their demand for rescission, and rejected an August 31,  
12 2010 tender letter. Id. ¶ 10. Plaintiffs allege that on September  
13 14, 2010, they paid Wachovia \$1.83 million -- the amount Wachovia  
14 claimed was due on the loan. Id. ¶ 12.

15 Plaintiffs' FAC contains three claims. Their first claim is  
16 that Wachovia violated TILA by failing to make required disclosures  
17 to Julie. Plaintiffs admit that John received TILA disclosures  
18 from Wachovia, but argue that Wachovia was obligated to make these  
19 disclosures to Julie as well because as a settlor and beneficiary  
20 of a revocable trust, she had an "ownership interest" triggering  
21 TILA. Id. ¶¶ 10-12.

22 Plaintiffs' second claim is that the TILA disclosures made to  
23 John were defective. Under Regulation Z, a borrower has the right  
24 to rescind a refinancing or equity mortgage transaction within  
25 three business days of the date the borrower receives the TILA  
26 disclosures or the date the borrower receives a notice of a right  
27 to cancel, whichever is later -- and within three years if the  
28 lender fails to provide such a notice. 12 C.F.R. § 226.15; 15

1 U.S.C. § 1635. Plaintiffs allege that the Notice of Right to  
2 Cancel ("Notice") delivered to John stated that his right to  
3 rescind the loan expired at midnight on February 26, 2008 -- the  
4 same day John received the Notice and signed it. Id. ¶¶ 14-15.  
5 Plaintiffs allege that the date on the Notice was altered by  
6 someone other than John to February 23, 2008, and that the Notice  
7 contains John's forged initials. Id. ¶ 15.

8 Plaintiffs' third claim is for injunctive relief in the form  
9 of a temporary restraining order and/or preliminary injunction  
10 restraining Wachovia from reporting Plaintiffs' loan to major  
11 credit reporting agencies. Id. ¶¶ 17-19.

12 In its Motion, Wachovia seeks dismissal of all three claims.  
13 As to Plaintiffs' first and second claims, Wachovia argues that  
14 Wachovia had no obligation to provide TILA disclosures to Julie;  
15 that any error in the disclosure to John should be excused as a  
16 "typo"; that Plaintiffs' TILA claims are barred by TILA's statute  
17 of limitations; that Plaintiffs' request for rescission is mooted  
18 by Plaintiffs' subsequent payment in full of the loan; and that  
19 Plaintiffs otherwise fail to plead facts sufficient to constitute a  
20 TILA claim. Mot. at 2. Wachovia argues that Plaintiffs' third  
21 claim should be dismissed because injunctive relief is a remedy  
22 rather than a claim for relief; because it is a state-law claim  
23 preempted by the Home Owners' Loan Act ("HOLA"); because Wachovia  
24 can demonstrate a reasonable likelihood of success on the merits;  
25 and because "even if the requested mandatory injunction were  
26 granted, Wachovia neither has the right nor ability to 'delete' the  
27 reported information it supplied to credit reporting agencies."  
28 Id.

**III. LEGAL STANDARD**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 129 S. Ct. at 1950. A motion to dismiss should be granted if the plaintiff fails to proffer "enough facts to . . . nudge[] their claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570.

**IV. DISCUSSION****A. Preliminary Matters**

Wachovia requests this Court to take judicial notice of a number of facts and documents. ECF No. 20 ("RJN"). Plaintiffs oppose this request. ECF No. 22-1 ("Opp'n to RJN").

1 The Court may take judicial notice of facts not subject to  
2 reasonable dispute. Fed. R. Evid. 201. Courts may take judicial  
3 notice of matters of public record, Hotel Emps. & Rest. Emps. Local  
4 2 v. Vista Inn Mgmt. Co., 393 F. Supp. 2d 972, 978 (N.D. Cal.  
5 2005), and may do so without converting a motion to dismiss into a  
6 motion for summary judgment, Lee v. City of Los Angeles, 250 F.3d  
7 668, 688-89 (9th Cir. 2001).

8 First, Wachovia requests the Court to take judicial notice of  
9 the following:

10 Wachovia Mortgage, FSB was a federal savings  
11 bank, subject to the Home Owner's Loan Act  
12 ("HOLA"), whose primary regulator was the  
13 Office of Thrift Supervision ("OTS") of the  
Treasury Department. Pursuant to a merger on  
November 1, 2009, Wachovia Mortgage is now a  
division of Wells Fargo Bank, N.A.

14 RJN at 2.

15 Wachovia claims this statement is supported by the Charter of  
16 Wachovia Mortgage, FSB, RJN Ex. A, and a November 1, 2009 letter  
17 converting Wachovia to a division of Wells Fargo Bank, N.A., id.  
18 Ex. B. In opposition, Plaintiffs argue that these documents lack  
19 adequate foundation, constitute inadmissible hearsay, and are  
20 improper subjects for judicial notice. Opp'n to RJN at 3.

21 That Wachovia is now part of Wells Fargo Bank is a fact of  
22 common knowledge not subject to reasonable dispute. Plaintiffs do  
23 not argue otherwise; their objections are merely procedural. As  
24 such, the Court takes judicial notice of the fact that Wachovia is  
25 now part of Wells Fargo Bank. As to Wachovia's request for the  
26 court to take judicial notice of the fact Wachovia was subject to  
27 HOLA and that OTS was its "primary regulator," the Court finds that  
28 these are legal determinations inappropriate for judicial notice.

1 Wachovia also asks the Court to take judicial notice of an  
2 adjustable rate mortgage note signed by John, RJN Ex. C ("Mortgage  
3 Note"), a deed of trust signed by John on February 22, 2008, id.  
4 Ex. D ("Deed of Trust"), and the Notice of Right to Cancel  
5 ("Notice") signed by John, id. Ex. E. Plaintiffs oppose, making  
6 the same foundation and hearsay objections above. Plaintiffs argue  
7 that the Notice "is at the core of this dispute such that it is  
8 incapable of accurate and ready determination as to its accuracy."  
9 Id. at 4.

10 A court may consider evidence on which the complaint  
11 "necessarily relies" if (1) the complaint refers to the document;  
12 (2) the document is central to the plaintiff's claim; and (3) no  
13 party questions the authenticity of the copy attached to the  
14 defendant's motion to dismiss. Marder v. Lopez, 450 F.3d 445, 448  
15 (9th Cir. 2006). Plaintiffs' FAC refers to both the Mortgage Note  
16 and the Notice, and both are central to their action. FAC ¶¶ 8,  
17 11, 14-15. However, Plaintiffs vigorously dispute the authenticity  
18 of the date and signature on the Notice. As such, the Court takes  
19 judicial notice of the Mortgage Note. As to the Notice, the Court  
20 only takes judicial notice of the undisputed facts evidenced by  
21 this document -- such that it exists and that John received it --  
22 but not the disputed fact that John received it and signed it on  
23 February 23, 2008. The FAC does not refer to the Deed of Trust.  
24 Given the nature of the action and the claims of impropriety, the  
25 Court opts against taking judicial notice of this document.

26 **B. Plaintiffs' First Claim**

27 Wachovia seeks dismissal of Plaintiffs' first claim, arguing  
28 that Wachovia owed Julie no duty to make TILA disclosures. Mot. at

2. Wachovia argues that the borrower of the loan was "John F. Shirley, as a trustee of the John F. Shirley and Julie E. Shirley Trust." Id. Wachovia argues that in their Complaint, Plaintiffs acknowledge that John, the trustee, received the required TILA disclosures, and thus Wachovia fulfilled its TILA disclosure duty when it made the disclosures to John.

Plaintiffs argue that as a settlor of a revocable living trust, Julie had an ownership interest in the trust, and argue that under TILA, "each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind." Opp'n at 4 (citing 12 C.F.R. § 226.2(a)(11)). Plaintiffs cite Amonette v. IndyMac Bank, F.S.B., 515 F. Supp. 2d 1176 (D. Haw. 2007) in support of their argument. Amonette merely holds that a trustee of a revocable living trust has standing to assert TILA claims for rescission of a loan made to the trust. Id. at 1178-79. It says nothing about the disclosure duties owed to trust beneficiaries.

Plaintiffs cite to no other law in support of their argument that Julie, as a settlor and beneficiary of the trust, was entitled to TILA disclosures separate from and in addition to the disclosures made to John, the trustee. The Court finds this argument to be unavailing. Were the law as Plaintiffs wish it to be, an entity lending to a trust would be required to spend considerable time and effort identifying and notifying each trust beneficiary or run the risk of violating TILA. By making TILA disclosures to the trustee, the lender provides notice to an individual who serves as a fiduciary of the beneficiaries, and thus reasonably ensures the beneficiaries will be provided notice. The

1 Court finds that Wachovia's disclosure obligations extended to the  
2 trustee, John, and not to the trust's beneficiaries or settlors.  
3 Because the first claim fails to state a claim under which relief  
4 can be granted and cannot be salvaged through amendment, the Court  
5 DISMISSES Plaintiffs' first claim WITH PREJUDICE.

6 **C. Plaintiffs' Second Claim**

7 Wachovia argues that Plaintiffs' second claim should be  
8 dismissed, contending that the Notice sent to John complied with  
9 TILA. Mot. at 3. Wachovia does not dispute that 15 U.S.C. §  
10 1635(a) gives borrowers the right to rescind within three business  
11 days of the date they receive notice of a right to cancel, and  
12 within three years if the lender fails to provide such a notice.  
13 Id. Wachovia contends that it is uncontested that Wachovia sent  
14 John the Notice, and that Plaintiffs' allegations of forgery and  
15 fraud in the document can be dismissed as "reliance on a possible  
16 typo." Id. In response, Plaintiffs argue that the "defects" in  
17 the Notice frustrated the purpose of the Notice, because the  
18 deadline to rescind given in the Notice was the same date John  
19 received the Notice. Opp'n at 3-4.

20 Taking the facts pleaded in Plaintiffs' FAC as true -- as it  
21 must -- the Court finds Wachovia's arguments in favor of dismissal  
22 to be unavailing. Assuming that John received the Notice on  
23 February 26, 2008, and the Notice provided that John's right to  
24 rescind the loan expired at midnight on February 26, 2008, then  
25 Plaintiffs did not receive notice of their three-day right to  
26 rescind. As such, Plaintiffs had three years to rescind the loan,  
27 and their May 3, 2010 letter seeking rescission would be timely.

28 Wachovia additionally argues that Plaintiffs' claim was



1 rendered moot when Plaintiffs paid off the loan, and the court  
2 cannot "rescind a loan that no longer exists." Mot. at 5.  
3 Wachovia cites no case law to support this argument. Plaintiffs  
4 mailed Wachovia a letter seeking rescission, which Wachovia  
5 rejected. Rather than risk litigation or further damage to their  
6 credit, Plaintiffs paid the balance Wachovia claimed was owed on  
7 the loan. It would not serve justice to deny Plaintiffs their  
8 statutory right to rescind a loan due to this act of caution on  
9 their part.

10 For these reasons, Wachovia's motion to dismiss Plaintiffs'  
11 Second Claim is DENIED.

12 **D. Plaintiffs' Third Claim**

13 Wachovia makes a number of arguments in favor of dismissal of  
14 Plaintiffs' third claim, including that it is preempted by HOLA;  
15 that "plaintiffs have little chance of prevailing on the merits";  
16 and that injunctive relief is a remedy rather than a separate cause  
17 of action. Id.

18 The Court finds merit in this last argument. Plaintiffs'  
19 third claim is not a claim for relief, but rather a remedy that may  
20 be appropriate should they prevail on their second claim.  
21 Furthermore, the only relief sought in Plaintiffs' third claim is a  
22 temporary restraining order and/or preliminary injunction  
23 prohibiting Wachovia from reporting Plaintiffs' loan to credit  
24 reporting agencies. Under Civil Local Rule 65, parties seeking a  
25 temporary restraining order or preliminary injunction must file a  
26 motion. Plaintiffs have taken no such action.

27 For this reason, the Court GRANTS Wachovia's Motion as to  
28 Plaintiffs' third claim and DISMISSES IT WITH PREJUDICE. In doing

1 so, the Court does not rule on the appropriateness of the  
2 injunctive relief sought or bar Plaintiffs from seeking a temporary  
3 restraining order or preliminary injunction by filing the  
4 appropriate documents and making the required legal showing. The  
5 Court merely dismisses the claim because it is not a claim, but a  
6 possible remedy under Plaintiffs' second claim.

7  
8 **V. CONCLUSION**

9 For the foregoing reasons, Defendant Wachovia Mortgage FSB's  
10 Motion to Dismiss is GRANTED IN PART and DENIED IN PART. The Court  
11 DISMISSES WITH PREJUDICE the first claim and the third claim in  
12 John F. Shirley and Julie E. Shirley's First Amended Complaint.

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14 IT IS SO ORDERED.

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16 Dated: March 9, 2011

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18 UNITED STATES DISTRICT JUDGE  
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